

Richard Posner: The Federal Court Maverick Turns Detractor

By Allen Mendenhall



DECEMBER 15, 2017

“I’M NOT a typical federal judge,” Richard Posner says in his new book *The Federal Judiciary*, which seems designed to affirm that claim.

Released in August, this tome shouldn’t be confused with his self-published *Reforming the Federal Judiciary*, released in September. The latter has generated controversy because it includes documents internal to the Seventh Circuit Court of Appeals, including personal emails from Chief Judge Diane Wood and confidential bench memoranda. The former, the subject of this review, is no less blunt, though one suspects the editors at Harvard University Press ensured that it excluded improper content.

Publication of both books coincides with the sudden announcement of Posner’s retirement. This quirky and opinionated jurist is going out with a bang, not a whimper, after serving nearly 36 years on the bench. He could have taken senior status; instead he’s withdrawing completely, citing his court’s handling of pro se appellants as the prime reason.

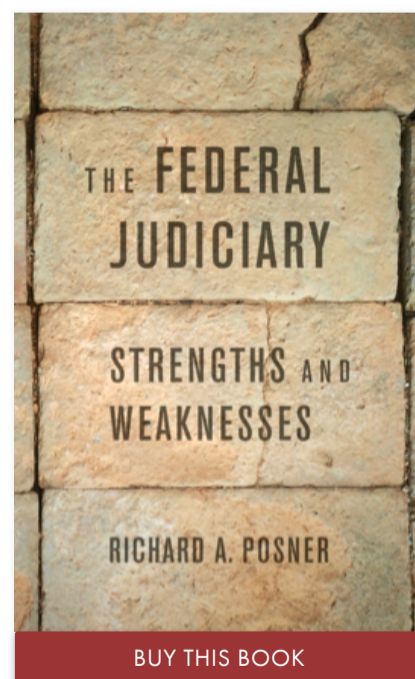
The Federal Judiciary presents “an unvarnished inside look” at the federal court system, which, Posner insists, “is laboring under a number of handicaps,” “habituated to formality, resistant to change, backward-looking, even stodgy.”

The Federal Judiciary

Strengths and Weaknesses

By Richard Posner

Published 08.14.2017
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464 Pages



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a self-styled pragmatist who champions resolving cases

ly and efficiently through common-sense empiricism resorting to abstractions or canons of construction. He Justice Oliver Wendell Holmes Jr., whose jurisprudence and the pragmatism of C. S. Peirce, William James, and John Dewey. His methodology relies on analyzing the facts and legal issues in a case, and then predicting the reasonable outcome in light of experience and the probable consequences of his decision. Accordingly, he follows his instincts unless some statute or constitutional provision stands in the way. Most of the time, the operative rules remain malleable enough to bend toward his purposes.

This fluid approach to judging stands in contradistinction to that of Justice Antonin Scalia, for whom Posner has little affection. In fact, Posner establishes himself as Scalia's opposite. Where Scalia was formalistic and traditional, Posner is flexible and innovative. Where Scalia was doctrinaire, Posner is pragmatic. Where Scalia was orthodox, Posner boasts, "I am willing to go [...] deep into the realm of unorthodoxy."

Posner's criticisms of Scalia can seem irresponsibly personal, involving not only Scalia's originalism and textualism (legitimate objects of concern) but also his religious views on Creationism (about which, Posner declares, Scalia was "wrong as usual"). He calls Scalia's belief in the devil "[c]hildish nonsense" and denounces Scalia's unhealthy lifestyle. In a low moment, he calls Scalia "careless" for dying next to a sleep apnea machine the ailing justice wasn't using. This rebuke is irreverent, but is it constructive or extraneous? Does it advance Posner's judicial methods while weakening the case for Scalia's?

Aspiring to be "relentlessly critical and overflowing with suggestions for reform," Posner attacks the "traditional legal culture" that, he says, "has to a significant degree outlived its usefulness." Cataloging the targets of his iconoclastic ire would be exhausting. He jumps from subject to subject, castigating "judicial pretense" and treating with equal fervor such weighty topics as statutory interpretation and such trivial matters as the denotation of "chambers" versus "office." He confers delightfully disrespectful labels ("slowpokes," "curmudgeons") on his colleagues but can also seem petty (complaints about food in the US Supreme Court cafeteria come to mind).

Most of his critiques have merit. His persistent assault on the sanctimony and pomposity of federal judicial culture is acutely entertaining, signaling to some of his more arrogant colleagues that they're not as important or intelligent as they might think.

Posner likes to shock. What other judge would assert that the Constitution is "obsolete" or ask when we'll "stop fussing over an eighteenth-century document" that institutes the basic framework of governance for the country? A bedrock principle underlying the separation-of-powers doctrine holds that the judicial branch interprets law while the legislative branch makes it. Posner, however, announces that federal judges legislate even though they're unelected. Conservative commentators would offer this fact as condemnation, but Posner extols it as an indispensable prerogative.

In Memoriam: The Optimistic Jurist

By Laura W. Brill

Richard Posner Is a Monster

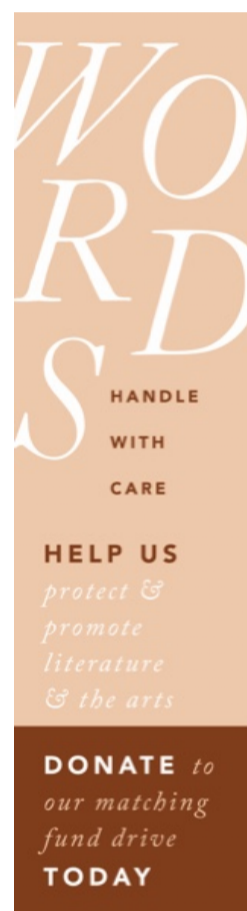
By Allen Mendenhall

The Evolution of a Supreme Court Justice

By Brachah Goykadosh

Freelance Constitutionalism: Akhil Amar and the History that Shadows Us

By Laura W. Brill



he alleges that judges are political actors, he's impatient with politicians. He ranks as the top weakness of the federal judiciary the fact that politicians nominate and confirm federal judges and justices. (The president nominates and the Senate confirms.) The basis of this objection is that politicians are mostly unqualified to evaluate legal résumés and experience.

A refrain Posner employs to advance his argument — “Moving on” — might serve as his motto for judges, who, in his mind, must break free from undue restraints of the past. “The eighteenth-century United States, the nineteenth-century United States, much of the twentieth-century United States,” he submits, “might as well be foreign countries so far as providing concrete guidance (as distinct from inspiration) to solving today’s legal problems is concerned.” This isn’t meant to be hyperbole.

His citations to Wikipedia and tweets — yes, *tweets* — enact the forward-looking attitude he celebrates: he’s not afraid of new media or of pushing boundaries. Consider the time he asked his law clerks to doff and don certain work clothing to test facts presented by litigants in a case before him.

His advice to colleagues on the bench: Let clerks refer to you by your first name; do away with bench memos and write your own opinions; stop breaking for three-month recesses; stagger hiring periods for law clerks; don’t employ career clerks; don’t procrastinate; don’t get bogged down in procedure at the expense of substance; be concise; read more imaginative literature; avoid Latinisms; abolish standards of review. If you’re an appellate judge, preside over district-court trials. And whatever you do, look to the foreseeable future, not backward, for direction.

Readers of his most recent book, *Divergent Paths*, will recognize in these admonitions Posner’s distinctive pet peeves. He believes that judges who don’t author their opinions are weak or unable to write well. If judges were required to write their opinions, he supposes, fewer unqualified lawyers would sit on the bench: inexpert writers, not wanting to expose their deficiencies, would not accept the nomination to be a federal judge.

Posner’s love of good writing is so pronounced that he praises Scalia, his chosen nemesis, for his “excellent writing style.” He sprinkles references to Dante, Tennyson, Keats, Fitzgerald, Nietzsche, T. S. Eliot, Orwell, and Edmund Wilson and supplies epigrams by Auden, Yeats, and Alexander Pope. Those who didn’t know it wouldn’t be surprised to learn that Posner majored in English at Yale.

Still one comes away with the impression that he has sacrificed precision for speed. He appears to have cobbled together several blog posts and other articles of only ephemeral significance to pad his polemic. He discusses judges’ “priors” on page 116 but doesn’t define that term (“a mixture of temperament, ideology, ambition, and experience”) until page 148. Liberal with block quotes, scattered in focus, he recycles by-now familiar arguments against *Bluebook* and legal jargon and other staples of the legal academy. Even those who agree with him on these points will balk at the redundancy.

stitution isn't only at the thematic level: it involves diction

ax. He tells us on page 408, "Pope Pius XII made peace with evolution in 1950." Then a page later, he states, "The Church has a 'problem' with evolution until Pius XII had made his peace with it in 1950." On page five, he writes, "almost all federal judicial opinions are drafted by law clerks [...] in the first instance, and edited more or less heavily by the judge." He then echoes himself on page 22: "[M]ost judges (and Justices) require their law clerks to write the initial draft opinion, which the judge then edits." He describes this same process again on page 276. "I write my own opinions," he declares only to repeat himself later: "I write and edit my own opinions." These are mere samples of a striking trend in Posner's book.

A former law professor, Posner concludes by assigning grades to the federal judiciary in eight categories: selection of judges (B), judicial independence (A-), rule of law (A), finality of judgments (B), court structure (B), management (C), understanding and training (C), and compensation (B+). Total? Around a B average. For all the fuss, that's a decent score.

Posner's characteristic arrogance is grandly exhibited. "I'm a pretty well-known judge," he assures us. His preface includes a short bibliography for "readers interested in learning more about me." He names "yours truly" (i.e., himself) in his list of notables in the field of law-and-economics, an indisputable detail that a more humble person would have omitted. Posner's self-importance can be charming or off-putting, depending on your feelings toward him.

Yet he's honest. And forthright. Not just the federal judiciary but the entire legal profession thrives off mendacity, which is not the same as a lie or embellishment. It's a more extravagant, systemic mode of false narrative that lawyers and judges tell themselves about themselves to rationalize and enjoy what they do. Posner sees through this mendacity and derides it for what it is. His frank irritability is strangely charming, and charmingly strange. The federal judiciary has lost a maverick but gained a needed detractor.

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